

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

* * *

JOSEPH ANTONETTI,

Plaintiff,

v.

DWIGHT NEVEN, *et al.*,

Defendants.

2:08-cv-01020-KJD-VCF

O R D E R

**(Motion for Expert (#87) and Motion to
Reconsider (#105))**

Before the court is plaintiff Joseph Antonetti's Motion for Expert. (#87). Defendants filed an Opposition (#89), and plaintiff filed a Reply (#92).

Also before the court is plaintiff's Motion to Reconsider. (#105). Defendants filed an Opposition (#106), and plaintiff filed a Reply (#109). The court held a hearing on January 29, 2013, and plaintiff appeared telephonically.

A. Relevant Background

The court granted plaintiff's motion to proceed *in forma pauperis* on September 4, 2008. (#2). On December 22, 2008, plaintiff filed a motion for leave to file an amended complaint. (#5). The court granted plaintiff's motion (#5) and screened his amended complaint on September 16, 2009. (#7). Plaintiff's amended complaint asserts claims against several defendants for constitutional violations that allegedly occurred at the High Desert State Prison. (#8). Defendants filed a motion to dismiss the amended complaint (#13) on November 5, 2009, based on their contention that they were immune from liability. As the court found that discovery was not necessary to address defendants' claim of immunity, it stayed discovery pending the outcome of the motion. (#22). Thereafter, on September 27, 2010, the court partially granted defendants' motion to dismiss (#13) and granted plaintiff's motion to file a

1 second amended complaint (#22). (#24). On the same day, the clerk filed plaintiff's second amended
2 complaint. (#25).

3 Prior to any scheduling order being entered, on October 11, 2010, remaining defendants filed
4 a motion for summary judgment, asserting, among other defenses, immunity. (#26). In May 2011,
5 when the defendants' motion was fully briefed but not yet ruled upon, the plaintiff filed a motion for
6 appointment of counsel (#37) and a motion for discovery (#38). On September 28, 2011, the court
7 issued an order granting in part and denying in part defendants' motion for summary judgment (#26).
8 (#43). On October 17, 2011, the court entered an order denying plaintiff's motion for appointment of
9 counsel (#37), granting plaintiff's motion for discovery (#38), and setting discovery deadlines. (#47).

10 The order provided a discovery cut-off date of

11 January 15, 2012, and a December 16, 2011, deadline for adding new parties and amending pleadings.

12 *Id.*

13 On October 19, 2011, only two days after the court denied plaintiff's first request for
14 appointment of counsel, plaintiff filed another motion for appointment of counsel. (#49). The court
15 denied the plaintiff's motion for counsel (#49). (#52). On December 20, 2011, the plaintiff filed a
16 motion for final disposition. (#53). On January 4, 2012, the plaintiff filed a motion to amend/correct
17 complaint. (#54). Defendants filed a motion to extend time on February 14, 2012. (#58). On February
18 22, 2012, plaintiff filed his third motion for appointment of counsel. (#59). On March 1, 2012, the
19 court denied plaintiff's motion for counsel (#59). (#62). On April 16, 2012, the court denied plaintiff's
20 motion for final disposition (#53) and motion to amend/correct complaint (#54), and granted
21 defendants' motion to extend time (#58). (#63).

22 Defendants filed a motion for summary judgment on April 17, 2012. (#64). The court issued
23 an order denying the motion for summary judgment (#64) on August 9, 2012. (#80). On August 17,
24 2012, plaintiff filed a motion for leave to amend complaint. (#81). On September 27, 2012, plaintiff
25 filed a motion for appointment of expert. (#87). On October 24, 2012, plaintiff filed a motion to

1 compel. (#91). On November 8, 2012, the court issued an order denying plaintiff's motion for leave
2 to amend complaint (#81), stating that the court will not entertain any further motions to amend, as
3 plaintiff continuously fails to "identify which proposed new defendants could not be identified earlier
4 when the evidence Plaintiff relies on was in his hands early in the litigation." (#94). Defendants filed
5 an opposition to plaintiff's motion to compel (#91) on November 13, 2012. (#96). On November 15,
6 2012, plaintiff filed another motion to amend complaint. (#97). Plaintiff filed his reply in support of
7 his motion to compel (#91) on November 27, 2012. (#101). On November 29, 2012, the court issued
8 a minute order scheduling a hearing on the motion to appoint an expert (#87) for January 29, 2013.
9 (#102).

10 Plaintiff filed one document seeking two forms of relief: (1) asking the court for a thirty day
11 extension past November 27, 2012, to amend or add parties and (2) asserting that the "court may wish
12 to compel defendants to answer discovery and interrogatories," which the court separated into two
13 documents. (#90 and #91). The Honorable Judge Dawson denied plaintiff's request for a thirty day
14 extension in his November 8, 2012, order. (#94). The undersigned issued an order with regard to the
15 relief sought relating to discovery on December 3, 2012. (#103). The court held that "plaintiff's
16 motion to compel responses to discovery served on defendants in an **unrelated matter** *after* discovery
17 in **this** matter has been closed for almost a year, is inappropriate and must be denied." *Id.* The court
18 also held that as "[p]laintiff makes arguments in his motion (#91) and reply (#101) relating to plaintiff's
19 medical files and asserting that defendants have failed to provide him the opportunity to review the files
20 even after the court ordered the same," "[t]he court will address plaintiff's medical files and his access
21 thereto during the January 29, 2013, hearing on the motion to appoint expert (#87)." *Id.*

22 On December 13, 2012, plaintiff filed a motion to reconsider the court's order (#103). (#105).
23 The court issued a minute order holding that "that the court will address plaintiff Joseph Antonetti's
24 Motion for Reconsideration of the Court's Order on the Motion to Compel (#105) during the January
25 29, 2013, hearing. No further briefing on the motion (#105) is required." (#107). On January 2, 2013,

1 defendants filed a response to the motion to reconsider (#105). (#106). Plaintiff filed a reply in support
2 of his motion to reconsider (#105) on January 11, 2013. (#109).

3 **B. Motion For Expert**

4 **1. Arguments**

5 Plaintiff argues that he needs an expert to “avoid a wholly one-sided presentation of opinions
6 on the issues at trial,” and that he “does not believe that a “lay person” knows or understands the
7 required care, how it was deviated from, or how it could and has affected/effected the plaintiff.” (#87).
8 Plaintiff states that he was denied dental care and that he “requires independent dental expert to testify
9 to actual and possible effects of this lack of care.” *Id.*

10 Defendants argue that the actionable claims remaining in this litigation relate only to the dental
11 claim and emotional distress claim. (#89). Defendants state that plaintiff’s motion should be denied,
12 because the “subject matter upon which the expert would be expected to give testimony is unknown”
13 and the plaintiff has not demonstrated that he would be unfairly prejudiced without an expert. *Id.*
14 Defendants assert that plaintiff is attempting to get preferential treatment by asking the court to appoint
15 an expert, and cite *Boring, et al. v. Kozakiewicz, et al.*, 833 F.2d 468 (3rd Cir. 1987) in holding that:

16 The plaintiffs' dilemma in being unable to proceed in this damage suit because
17 of the inability to pay for expert witnesses does not differ from that of
18 nonprisoner claimants who face similar problems. Nonprisoners often resolve
19 that difficulty through contingent fee retainers with provisions for arranging
20 expert testimony. By seeking government funding in this case, plaintiffs are in
21 effect asking for better treatment than their fellow-citizens who have not been
22 incarcerated but who have at least equal claims for damages.

23 Defendants recite what the plaintiff must demonstrate to succeed on an Eighth Amendment
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25
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1 deliberate indifference claim¹ and an intentional infliction of emotional distress claim². (#89).
 2 Defendants do not, however, argue why an expert is not needed to testify regarding these claims. *Id.*
 3 Defendants assert that “[p]laintiff cannot demonstrate that he would be unfairly prejudiced without the
 4 use of an expert,” and that “[a]ll that is set forth in [p]laintiff’s requesting brief is a generalized need
 5 without explanation.” *Id.*

6 Plaintiff states in his reply that he does not know the risks relating to untreated tooth decay or
 7 how it “effects and affects the human condition,” and that he needs an expert for examination and
 8 treatment³. (#92). Plaintiff states that unless the defendants are willing to stipulate to all of his alleged
 9 injuries and allegations, an independent expert is warranted. *Id.* Plaintiff states that he claims actual
 10 “physical and emotional distress,” and that “leaving a person untreated for a serious medical need for
 11 4-6 years seems **to speak for itself.**” *Id.* Plaintiff states that experts have scientific, technical, or
 12 specialized knowledge, and that he should not be expected to testify as he is not a dental expert. *Id.*
 13 Plaintiff argues that “usually medical issues and prison conditions support appointing an expert,” and
 14 cites two cases: *McKinney v. Anderson*, 924 F.2d 1500 (9th Cir. 1991), and *Jordan v. Gardner*, 986 F.2d
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16 ¹To succeed on an Eighth Amendment claim based on prison medical treatment, an inmate must show
 17 ‘deliberate indifference to serious medical needs.’” *Jett v. Penner*, 439 F.3d 1091, 1096 (9th Cir. 2006) (quoting *Estelle*
 18 *v. Gamble*, 429 U.S. 97, 104(1976)). A serious medical need is demonstrated by showing that the “failure to treat a
 19 prisoner’s condition could result in further significant injury or the unnecessary and wanton infliction of pain,” and
 20 deliberate indifference toward that need is demonstrated by showing a prison official engaged in a “purposeful act or
 failure to respond to a prisoner’s pain or possible medical need, causing harm to the inmate. *Estelle*, 429 U.S.
 at 104. The prison official must personally be aware of the need and fail to respond in order to behave with deliberate
 indifference. *Simmons v. Navajo County*, Ariz. 609 F.3d 1011 C.A.9 (Ariz.), 2010.

21 ² In order to prevail on an IIED claim under Nevada law, Plaintiff must show (1) extreme and outrageous
 22 conduct on the part of Defendants; (2) intent to cause emotional distress or reckless disregard for causing emotional
 23 distress; (3) that Plaintiff actually suffered extreme or severe emotional distress; and (4) causation. *Posadas*, 109 Nev. at
 456, 851 P.2d at 444 (citing *Star v. Rabello*, 97 Nev. 124, 125, 625 P.2d 90, 91-92 (1981)). *Miller v. Jones*, 114 Nev.
 1291, 1299-1300, 970 P.2d 571, 577 (1998).

24 ³ To the extent plaintiff seeks the expert for “treatment,” this is not the proper function of an expert and his
 25 request should be denied. “The function of an expert witness is to testify at trial to assist the trier of fact in
 understanding the evidence.” *Lopez v. Scribner*, CVF045595OWWDLBP, 2007 WL 1215420 (E.D. Cal. Apr. 24,
 2007).

1 1521 (9th Cir. 1993). The court notes that *McKinney* was vacated in 1991 and *Jordan* does not stand
2 for this proposition, as the prisoners used an expert in that action but there is no discussion of the expert
3 being appointed by the court. *Id.*

4 **2. Relevant Law/Discussion**

5 **a. Medical Records and Grievance Print-Outs**

6 As an initial matter, the court addressed plaintiff's requests for medical records and grievances
7 during the hearing, as there were arguments in the papers regarding the production of these documents.
8 The parties agreed that the court previously ordered the defendants to file under SEAL the medical
9 records and provide them to plaintiff for review. Plaintiff represented during the hearing that he has
10 repeatedly sought to review the medical records, but has been told that he will only be able to review
11 the records when he is released from "lock-down." Plaintiff represented to the court that he does not
12 believe he will be released from "lock-down." Defense counsel stated during the hearing that she
13 believed that the medical records went to the medical department and not to the Warden. She advised
14 that she would research what happened regarding the records. The parties also made representations
15 to the court during the hearing regarding the production of the grievance print-outs.

16 The court finds that plaintiff's medical records and grievance print-outs are essential to plaintiff
17 presenting his claim for denial of dental care, and that regardless of discovery being closed, plaintiff is
18 entitled to those documents and defendants must produce them. Defendants must provide plaintiff with
19 his complete medical file and all of his grievance print-outs on or before April 1, 2013. If, after
20 reviewing the medical files, grievance print-outs, and this order, plaintiff still seeks relief from the court,
21 he may file an appropriate motion.

22 **b. Appointment of Expert**

23 "The district court has the discretion to appoint an expert pursuant to Rule 706(a) of the Federal
24 Rules of Evidence, which reads, in part, "[t]he court may on its own motion or on the motion of any
25 party enter an order to show cause why expert witnesses should not be appointed" *Lopez v.*

1 *Scribner*, CVF045595OWWDLBP, 2007 WL 1215420 (E.D. Cal. Apr. 24, 2007) (citing Fed. R. Evid.
2 706(a); *Walker v. American Home Shield Long Term Disability Plan*, 180 F.3d 1065, 1071 (9th
3 Cir.1999)). "The plain language of section 1915 does not provide for the appointment of expert
4 witnesses to aid an indigent litigant." *Hannah v. United States*, 523 F.3d 597, 601 (5th Cir. 2008)
5 (quoting *Pedraza v. Jones*, 71 F.3d 194, 196 (5th Cir.1995)). Pursuant to Rule 706, however, the court
6 has discretion to apportion costs in the manner directed by the court, including the apportionment of
7 costs to one side. Fed. R. Evid. 706(b). In situations such as this, where a plaintiff is proceeding in
8 forma pauperis and is presumably unable to pay for an expert, and the government would bear the cost
9 of appointing the expert, the "court should exercise caution." *Id.*

10 "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand
11 the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill,
12 experience, training, or education, may testify thereto in the form of an opinion or otherwise." Fed. R.
13 Evid. 702. The decision whether or not to admit expert testimony does not rest upon the existence or
14 strength of the expert's opinion but rather whether the expert testimony will assist the trier of fact in
15 drawing its own conclusion as to a fact in issue. *Lopez*, 2007 WL 1215420 *1 (citing *United States v.*
16 *Rahm*, 993 F.2d 1405, 1412 (9th Cir.1993).

17 Plaintiff alleges an Eighth Amendment violation based on medical treatment (#22) and "the trier
18 of fact will be called upon to determine whether or not plaintiff had serious medical needs and, if so,
19 whether or not defendants were deliberately indifferent to those medical needs." *Lopez*, 2007 WL
20 1215420 *1. "Medical" needs include a prisoner's "physical, dental, and mental health." *Borja v.*
21 *Gonzalez*, 2011 WL 5546874 *1

22 The court finds that the issue of whether plaintiff's untreated tooth decay over several years
23 constitutes a "serious medical need" is not a complex issue requiring an expert. *See Lopez*, 2007 WL
24 1215420 *1 (citing *Walker* at 1071) (finding that the district court's decision to appoint an independent
25 expert to assist the court in evaluating contradictory evidence about an elusive disease of unknown
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1 origin was appropriate); *see also Ledford v. Sullivan*, 105 F.3d 354, 359 (7th Cir.1997) (trier of fact's
2 determination of deliberate indifference not so complicated that an expert was required to establish pro
3 se inmate's case).

4 Plaintiff's medical records (ordered herein to be produced to plaintiff) presented to the trier of
5 fact can adequately demonstrate the seriousness of the decay, the progression of the decay caused by
6 non-treatment, and the present condition of plaintiff's teeth. Harm caused by tooth decay is not too
7 complex for a juror to recognize. As the court held in its order on the motion for summary judgment
8 (#43), "[p]rison staff need not have expert medical training to know that once begun, tooth decay is a
9 continual process leading to larger health problems and, often, excruciating pain," and "[w]hile such
10 decay may not normally be an emergency, the continual delay of treatment, especially when spread over
11 years rather than a handful of months, turns "mere delay" into a potentially "substantially" harmful
12 situation." Plaintiff is able to testify as to the condition of his teeth, the continual decay, his requests
13 for treatment, and his pain and suffering. The grievance print-outs will also assist plaintiff in
14 demonstrating the delay in treatment over the six years.

15 With regard to the intent of the officers, "the finder of fact will conduct an objective and
16 subjective analysis of [d]efendants' state of mind." *Borja* 2011 WL 5546874 *2 (citing *Farmer v.*
17 *Brennan*, 511 U.S. 825, 838-839, 114 S.Ct. 1970, 128 L.Ed.2d 811 (1994)). "Expert testimony is not
18 required to adequately evaluate evidence of Defendants' state of mind at the time of the incident."
19 *Ledford v. Sullivan*, 105 F.3d 354, 359 (7th Cir.1997). Appointing an expert is not warranted. *Id.*

20 To succeed on his emotional distress claim, the plaintiff must show (1) extreme and outrageous
21 conduct on the part of defendants; (2) intent to cause emotional distress or reckless disregard for causing
22 emotional distress; (3) that plaintiff actually suffered extreme or severe emotional distress; and (4)
23 causation. *Posadas*, 109 Nev. at 456, 851 P.2d at 444 (citing *Star v. Rabello*, 97 Nev. 124, 125, 625
24 P.2d 90, 91-92 (1981)). *Miller v. Jones*, 114 Nev. 1291, 1299-1300, 970 P.2d 571, 577 (1998). Plaintiff
25 has not sought an expert to testify as to any emotional distress allegedly caused, and has only sought a
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1 dental expert. (#87 and #92). An expert is not required to establish plaintiff's claim of emotional
2 distress, as the medical records, grievance print-outs, and plaintiff's testimony will establish whether
3 neglecting the tooth decay was "extreme and outrageous" and what harm the plaintiff suffered. As with
4 the deliberate indifference claim, the defendants' testimony will adequately address the 'intent' element
5 of the claim, and an expert is not necessary. *See Ledford*, 105 F.3d at 359.

6 **C. Motion For Reconsideration**

7 **1. Arguments**

8 Plaintiff argues in his motion for reconsideration that the court should reconsider its order
9 (#103), as (1) plaintiff is not confused, (2) plaintiff has not been provided with grievance printouts, (3)
10 he has not been provided with medical files⁴, (4) newer requests for discovery have not been answered,
11 and (5) he does not know all of the procedural issues or what he must do, and is not an experienced
12 litigator. Defendants assert that reconsideration is not appropriate merely because plaintiff disagrees
13 with the court's order. (#106). Plaintiff states in his reply that he has diligently pursued discovery in
14 this action and that any confusion in discovery is due to defendants' requests for extensions and changes
15 of attorneys. (#109).

16 **2. Relevant Law/Recommendation**

17 Under Rule 60(b), "[o]n motion and just terms, the court may relieve a party or its legal
18 representative from a final judgment, order, or proceeding for the following reasons: (1) mistake,
19 inadvertence, surprise, or excusable neglect, (2) newly discovered evidence that, with reasonable
20 diligence could not have been discovered in time to move for a new trial under Rule 59(b), (3) fraud
21 (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing
22 party, (4) the judgment is void, (5) the judgment has been satisfied, released or discharged; it is based
23 on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer

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25 ⁴The court has ordered defendants to produce plaintiff's medical records and grievance prin-outs, which should
26 address plaintiff's concerns in this regard.

1 equitable, or (6) any other reason that justifies relief.” Federal Rule of Civil Procedure 60(b).

2 The court finds that reconsidering its order (#103) is not appropriate. Plaintiff has not
3 demonstrated that the court’s order was the result of mistake, inadvertence, surprise, or excusable
4 neglect. Fed. R. Civ. P. 60(b). The court’s order correctly stated that discovery was closed, and plaintiff
5 has not argued that this is a false statement (#103). Plaintiff has not presented the court with any newly
6 discovered evidence. Fed. R. Civ. P. 60(b). Plaintiff has also not demonstrated that the order (#103)
7 is void. *Id.* The fifth factor does not apply to the court’s order (#103). *Id.* Plaintiff has not presented
8 the court with any other reason that justifies relief from the court’s order (#103). *Id.* Reconsideration
9 under Rule 60(b) is not appropriate, and plaintiff’s request is denied. *Id.*

10 Accordingly, and for good cause shown,

11 IT IS ORDERED that plaintiff Joseph Antonetti’s Motion for Expert (#87) is DENIED *without*
12 *prejudice.*

13 IT IS FURTHER ORDERED that, on or before April 1, 2013, defendants must provide plaintiff
14 with his complete medical record and all of his grievance print-outs.

15 IT IS FURTHER ORDERED that plaintiff’s Motion to Reconsider (#105) is DENIED.

16 DATED this 30th day of January, 2013.

17 

18 **CAM FERENBACH**
19 **UNITED STATES MAGISTRATE JUDGE**